SUPREME COURT, U. S.

133

No. [redacted]

FILED

MAY 27 1968

JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

GEORGE H. FULTZ,

Petitioner,

vs.

STATE OF OHIO.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BERNARD J. GILDAY, JR.

Attorney for Petitioner

1500 American Building

Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	10
Appendix A	11

CITATIONS

Beck v. Ohio, 379 U.S. 89	5, 8
Brinegar v. United States, 338 U.S. 160	6
Carroll v. United States, 267 U.S. 132	6
Carter v. United States, 317 Fed. 2d 386	6
Dixon v. Maxwell, 177 Ohio State 20	6
Draper v. United States, 358 U.S. 307	5
Staples v. United States, 320 Fed. 2d 817	6
State v. Rogers, 94 Ohio Law Abstract 110	6
State v. Stotts, 8 Ohio Appeals 2d 97	5
United States v. DiRe, 332 U.S. 581	9

STATUTES

Ohio Revised Code 2935.04	6
Ohio Revised Code 2935.03	7

CONSTITUTIONS

Amendment IV, United States Constitution	2
Amendment XIV, United States Constitution	3

In The

Supreme Court of the United States

October Term, 1967

No. ———

GEORGE H. FULTZ,

Petitioner,

vs.

STATE OF OHIO.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

George H. Fultz, through his retained counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio.

OPINIONS BELOW

George H. Fultz was convicted of carrying concealed weapon (Revised Code of Ohio, Section 2923.01) by the Court of Common Pleas, Hamilton County, Ohio, a jury having been waived, on December 19, 1966. No written opinion was rendered. The Court of Appeals for the First Appellate District of Ohio affirmed that conviction on May 8, 1967, with a per curiam finding no error prejudicial to the rights of petitioner. The opinion of the Supreme Court of the State of Ohio, which affirmed that conviction, was entered on February 28, 1968 and is reported at *13 Ohio State 2d 79*. (Appendix A, *infra*. pp. 12-15)

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 USC 1257(3) since the right of petitioner to be free from unreasonable search, unlawful seizure and arrest under Amendment IV to the Constitution of the United States and the right to due process of law under Amendment XIV to the Constitution of the United States were denied to him.

QUESTIONS PRESENTED

1. Does probable cause to believe that a felony has been or is being committed exist where the only information or knowledge held by the arresting officer consists of a "man-wanted" police-radio broadcast, the content of which message is not received in evidence.

2. When a police officer only has some hearsay information, in the form of a police-radio broadcast that an arrest warrant for a misdemeanor has been issued upon a citizen's affidavit, may such officer lawfully arrest, detain and search the person named in the arrest warrant and his vehicle without having actual, physical possession of such warrant, where such officer is not a member of the police unit to which the arrest warrant was directed and where the arrestee violates no law in the officer's presence.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are Amendments IV and XIV which read in material parts, as follows:

Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 30, 1966, at approximately 3:00 p.m., Ohio State Highway Patrolman Miller stopped the vehicle of Petitioner at the intersection of Loveland-Madeira Road and Branch Hill Road, Hamilton County, Ohio, and placed Petitioner under arrest. At this time, Patrolman Miller had no warrant for Petitioner's arrest and did not observe him violate any law of the State of Ohio. At approximately 2:35 p.m. on April 30, 1966 the Hamilton County Communications Center broadcast a report that *"a person with a shotgun"* was wanted by the Loveland, Ohio Police. Officer Miller heard this broadcast but had no other information, of any kind or type, concerning Petitioner. When asked, in trial, by the Prosecuting Attorney,

> "and why did you stop the car that Mr. Fultz was driving Officer?

Patrolman Miller replied,

> *"On the authority of a radio message."*

No description of Petitioner was given in this broadcast and the message itself was never received in evidence by the Trial Court, which fact was regretted by The Supreme Court of Ohio.

At approximately 12:45 p.m. on April 30, 1966, Police Chief Fritz, Loveland Police Department, answered a call at a Trailer Park in Loveland, Ohio, and proceeded to transport, in his police cruiser, from this Trailer Park, one Dolly Meece, to the Lockland, Ohio Police Station for the purposing of allowing Mrs. Meece to charge Petitioner with the crime of assault and battery, a misdemeanor.

Sometime between the hours of 1:50 p.m. and 2:45 p.m. o'clock, a warrant for the arrest of Petitioner for assault and battery was issued. Chief Fritz took possession of the same and drove to the location where Petitioner was in custody and detained by Patrolman Miller, arriving at such point at 3:20 p.m.

At about 3:07 p.m. Ohio State Highway Patrolman, Vernon Wright, who, also, had heard the aforementioned broadcast arrived at the intersection where Petitioner was being detained. At this time Petitioner was out of his vehicle and both her person and his automobile had been searched by Patrolman Miller. Officer Wright immediately proceeded to re-search Petitioner's vehicle and found, under the front seat, a 32 caliber revolver. Prior to and at the time of both searches neither Patrolman Miller nor Patrolman Wright knew that a warrant charging Petitioner with a misdemeanor had been issued.

At approximately 7:00 p.m. on April 30, 1966, Petitioner was charged by Officer Wright with the crime of carrying concealed weapon. At no time was Petitioner ever charged with or prosecuted for any violation of law for any act which allegedly occurred at the Milford Trailer Park, and/or for any act which gave rise to the Police radio broadcast.

The Grand Jury of Hamilton County, Ohio, on June 2, 1966, returned its indictment charging therein a violation of Section 2923.01 (Carrying Concealed Weapons) Revised Code of Ohio. Prior to arraignment, Petitioner filed his written motion to suppress evidence which motion was overruled by the Trial Court. Trial being had before the Court, a jury being waived, the Court overruled Petitioner's in-trial, oral motion to suppress evidence and, over the objection of Petitioner, received in evidence the weapon found by Patrolman Wright, aforesaid.

From the judgment of guilty as charged rendered by the Trial Court and the overruling of Petitioner's motion for new trial, appeal was taken to the First District Court of Appeals, Hamilton County, Ohio, which Court affirmed the judgment of the Trial Court and found that the record discloses no error prejudicial to the rights of Petitioner.

From that affirmance, Petitioner filed his motion for leave to appeal to the Supreme Court of Ohio and an appeal as of right, in that a substantial constitutional question existed. The Constitutional question has been present throughout the Trial and all stages of the appeal. The appeal was allowed and the Supreme Court of Ohio, in a written opinion, affirmed the judgment of conviction.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Ohio is squarely in conflict with this Court's decision in *Beck, Petitioner* v. *State of Ohio,* 379 U.S. 89.

The standards of probable cause are constitutionally fixed and so sufficiently determined judicially that, without hesitation it may be said:

1. Probable cause is more than suspicion and less than the quanta of evidence necessary to sustain a conviction. (*Draper* v. *U. S.,* 358 U.S. 307 and *State* v. *Stotts,* 8 Ohio App. 2d 97)

2. Probable cause is a *reasonable* ground for *belief of guilt* and

> "this means less than evidence which would justify condemnation or conviction: probable cause exists when the facts and circumstances within the knowledge of the officer making the arrest or search, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."
>
> (*Brinegar* v. *U. S.*, 338 U.S. 160 and *State* v. *Rogers*, 94 Ohio Law Abs. 110, at page 115)

3. Probable cause must *precede* a lawful arrest for a felony and *precede* a search incidental to and contemporaneous with a lawful arrest. (*Carroll* v. *U. S.*, 267 U.S. 132 and *Carter* v. *U. S.*, 317 F.2d 386)

4. Even where probable cause to arrest and probable cause to search is established, the constitutional mandate is *that the arrest must also be lawful* — An arrest authorized and recognized by state arrest statutes. (*Staples* v. *U. S.*, 320 F.2d 817)

It is completely clear that *Section 2935.04* Revised Code of Ohio, authorized and permits an arrest without a warrant for a *FELONY* only and does not pertain to or concern misdemeanors. In *Dixon* v. *Maxwell*, 177 Ohio St. 20, at page 21, the Ohio Supreme Court said:

> "It is not necessary that an officer know that a specific crime has been committed in order for him to have probable cause to make an arrest. It is sufficient if he has reasonable grounds to believe from the circumstances that a *felony* has been committed and *that the accused has committed it.*" (Emphasis added)

Ohio Revised Code, *Section 2935.03*, which governs arrests for misdemeanors, specifically provides that the arrest is lawful only if:

1. A warrant has been obtained.
2. The misdemeanor is committed in the officer's presence.

In the instant case neither Officer Miller nor Officer Wright knew or could or did testify that he had reasonable, probable cause to believe a felony had been committed by this petitioner.

(Record, page 33 — Direct Examination of Patrolman Miller.)

"THE COURT: Sustained. Let me ask this: What felony did you have a belief had been committed, Officer?

"THE WITNESS: Well, the message, as I recall—

"THE COURT: You say you had a belief. What was your belief as to what felony?

"THE WITNESS: Well, he was wanted by the Loveland Police Department.

"THE COURT: For what?

"THE WITNESS: *I didn't know what he was wanted for,* but I knew that a warrant was obtained."

While this officer knew of the existence of a warrant, he did not have possession of it nor was it directed to the police unit of which he was a member.

Their only information was a brief radio broadcast concerning a person with a shotgun, sought by Loveland, Ohio Police. Possession of a shotgun is no crime and no shotgun was ever found by either officer. Neither officer knew this petitioner; neither had any prior contact with him or information about him; neither officer went to the Trailer Park in Loveland, Ohio, where a citizen had a complaint,

nor, prior to the arrest, spoke with a Loveland, Ohio Police Officer about a disturbance; and neither ever observed petitioner violate any law. Most significantly and strangely no charge was filed or prosecution commenced for any felony allegedly committed at a Loveland Ohio Trailer Park. Finally, neither officer knew or could state for *what crime,* felony or misdemeanor, they were arresting petitioner, particularly Officer Miller, who made and completed the arrest "because this man was wanted by the Loveland Police" — "on the authority of a radio message." (*Record, Page 31.*)

It is respectfully submitted that a man-wanted-police-radio message, *in and of itself* cannot constitute probable cause. A mere awareness of the vast number of false police reports demands the conclusion that while the Police Radio Announcer correctly and honestly floods the airwaves with reports he receives, his sources of information are not immediately verified, are often inaccurate, and, all too frequently are totally false. The Announcer is trustworthy — the report he receives is not. Not until and unless the radio bulletin is reasonably verified and proof of such verification is available and offered can it be logically contended that the "man wanted" broadcast is sufficient to constitute "a reasonable ground for belief of guilt." In this vein the words of Mr. Justice Stewart in *Beck* v. *Ohio,* 379 U.S. 89, ring clear:

> "good faith on the part of the officer is not sufficient to show probable cause."

The instant cause forcefully demonstrates that probable cause to believe a felony had been or was being committed did not exist and that, therefore, the arrest was unlawful.

The search of a vehicle as an incident to a lawful arrest is an area into which our Courts have not hesitated to tread.

By actual count petitioner finds thirty-six (36) federal decisions concerned with this subject from 1949 (*Brinegar* v. *U. S.*, 338 U.S. 160 and *U. S.* v. *O'Brien*, 174 Fed. 2d 341) to *Preston* v. *U. S.*, 376 U.S. 364, which was announced in 1964. Nor has Ohio been silent in this section of the criminal law. (*State* v. *Bernius*, 177 Ohio St. 155; *State* v. *Thompson*, 1 Ohio App. 2d 533 and *State* v. *Call*, 8 Ohio App. 2d 877. The principles gleaned from these pronouncements which could be properly discussed when considering the facts at hand may be summarized thusly:

A vehicle may be lawfully searched incidental to a lawful arrest made therein if—

a. A search appears reasonably necessary to protect the officer;

b. A search appears reasonably necessary to prevent escape;

c. A search appears reasonably necessary to prevent the secreting and/or destruction of evidence or contraband;

d. The officer reasonably believes that the vehicle is being used in the commission of a crime.

And it appears that so long as the arrest is lawful under state arrest statutes, whether it be for a felony or a misdemeanor, the incidental search is lawful. Yet, casual scrutiny of the facts, heretofore noted herein, convinces that not one of such rules prompted the search by Officer Wright of petitioner's vehicle. No valid legal reason can be found for the entrance into petitioner's car: and what was found therein cannot be considered for:

> "a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."
>
> *U. S.* v. *DiRe*, 332 U.S. 581

CONCLUSION

The ultimate result of the arrest, search, trial and conviction of petitioner makes a close look at the constitutional questions involved of compelling importance. The gross illegality of petitioner's arrest and the search of his vehicle not by the arresting officer and not as an incident to a valid arrest urge that the Petitioner for a Writ of Certiorari be granted.

Respectfully submitted,

BERNARD J. GILDAY, JR.
Attorney for Petitioner
1500 American Building
Cincinnati, Ohio 45202

APPENDIX A

Here is set forth the opinion rendered in the Supreme Court of the State of Ohio.

THE STATE OF OHIO, APPELLEE, *v.* FULTZ, APPELLANT.

[Cite as State v. Fultz, 13 Ohio St. 2d 79.]

Arrest without warrant—Probable cause—What constitutes—Information received by officer over police radio.

1. To have probable cause to arrest without a warrant an officer must have sufficient information from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. (Section 2935.04, Revised Code, construed and applied.)
2. Where a police officer has received information over the police radio and that information is such as to give the officer reasonable grounds to believe a felony has been committed, such officer has probable cause to make an arrest.

(No. 41004—Decided February 28, 1968.)

APPEAL from the Court of Appeals for Hamilton County.

On April 30, 1966, the chief of police of Loveland, Ohio, was summoned to a trailer park in that city. There he met one Dolly Meece who accompanied him to Lockland where she signed an affidavit charging George H. Fultz, appellant herein, with assault and battery, a misdemeanor. A warrant was issued for his arrest.

A call was put out on the police radio for the apprehension of Fultz. From the testimony at the trial it appears that the radio message contained the information

that a warrant had been issued for the arrest of Fultz; that he was armed; and that he had assaulted some people with a gun.

Within a short time a state highway patrolman who had heard the radio message stopped Fultz in his car at the intersection of Loveland-Madeira Road and Branch Hill Pike. A second patrolman arrived shortly thereafter and conducted a search of Fultz's car. He found a gun under the front seat.

Subsequently, Fultz was indicted for and found guilty of the crime of carrying a concealed weapon. The judgment of conviction was affirmed by the Court of Appeals and the cause is now before this court following allowance of a motion for leave to appeal.

Mr. Melvin G. Rueger, prosecuting attorney, and *Mr. Leonard Kirschner,* for appellee.

Messrs. Morr & Gilday and *Mr. Bernard J. Gilday, Jr.,* for appellant.

MATTHIAS, J. The primary question raised by this appeal is whether an arresting officer may base his belief that a felony has been committed on information received by him from a broadcast over the police radio. It is the appellant's position that such a source of information is not reliable enough to furnish the officer with probable cause to make the arrest.

In disposing of this question it is well to consider the realities of crime and law enforcement in present-day society. To effectively combat crime today, the concerted effort of local, state and federal officers, with their vast network of radio and teletype communication systems, is required. The present-day criminal is a mobile criminal. Because of his use of the motor vehicle and other means of rapid transportation even a slight delay in his apprehension will give him an opportunity to be far removed from

the scene of the crime and the person or persons he has injured or exploited. The criminal-at-large is a threat to society; thus, it is the duty of the police to apprehend him at the earliest opportunity not only because of the crime committed but to prevent further depredations by him.

Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by the modern-day criminal. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information.

A police officer necessarily relies on the information he receives over the police radio, and upon the receipt of such information it is the duty of the officer to act and act quicky. And, where the information is such as to give the officer reasonable grounds to believe a felony has been committed, then he has probable cause to make an arrest.

In the instant case, the arresting officer was a state highway patrolman. Section 5503.02, Revised Code, provides in part:

"* * * The superintendent of the state highway patrol or any patrolman may arrest without a warrant any person, who is the driver of or a passenger in any vehicle operated or standing on a state highway, who he has reasonable cause to believe is guilty of a felony, under the

same circumstances and with the same power that any peace officer may make such arrest. * * *"

Furthermore, Section 2935.04, Revised Code, reads as follows:

"When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, *any person without a warrant* may arrest another whom he has *reasonable cause to believe* is guilty of the offense, and detain him until a warrant can be obtained." (Emphasis added.) It is worth noting that, under the terms of this statute, even a private citizen may make an arrest upon reasonably reliable information that a felony has been committed.

For an arrest without a warrant to be constitutionally valid the arresting officer must have probable cause to make it at that time. To have probable cause the officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. *Brinegar* v. *United States,* 338 U.S. 160; *Henry* v. *United States,* 361 U.S. 98, 102; and *Beck* v. *Ohio,* 379 U.S. 89.

The officer in the instant case testified that at the time of the arrest he believed that a felony had been committed by the appellant. The question is: Did he have reasonable ground for such belief? This is a question of fact and is dependent upon the information the officer received from the police radio message.

Unfortunately, the record does not contain a complete statement of what went out over the police radio. However, from the testimony in the record, it is clear that the officer learned from the police radio that appellant had assaulted persons in a trailer court with a gun (a felony under Section 2901.241, Revised Code); that he was

armed; and that a warrant had been issued for his arrest. Certainly, with such information in his possession the officer had probable cause to make the arrest. The arrest, therefore, was valid.

Appellant has also questioned the validity of the search of his car which produced the weapon upon which the present conviction for carrying a concealed weapon is based. The officer had been informed that appellant was armed, and the search, made by a second officer arriving a few minutes later, was conducted as an incident of the arrest. It is now well settled that a search of a motor vehicle incident to a valid arrest is a valid search. *Brinegar* v. *United States, supra* (338 U.S. 160). See *Dixon* v. *Maxwell,* 177 Ohio St. 20; *Draper* v. *United States,* 358 U.S. 307; *Harris* v. *United States,* 331 U.S. 145; and *United States* v. *Rabinowitz,* 339 U.S. 56.

Having determined that the arrest in the present case was valid, we conclude that the search was also valid.

There being no error prejudicial to appellant, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, O'NEILL, HERBERT and BROWN, JJ., concur.

SUPREME COURT, U.S.
FILED
JUL 23 1968
JOHN F. DAVIS, CLERK

No. 133

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

GEORGE H. FULTZ,
Petitioner,

v.

STATE OF OHIO,
Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

MELVIN G. RUEGER
Prosecuting Attorney

LEONARD KIRSCHNER
Ass't. Prosecuting Attorney
420 Court House
Cincinnati, Ohio 45202
Attorneys for Respondent

RICHARD J. MORR
MORR & GILDAY
1500 American Building
Cincinnati, Ohio
Attorney for Petitioner

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

INDEX

Opinions Below 1

Jurisdictional Statement 1

Questions Presented 2

Statement of the Case 2

Argument Against Granting the Writ 4

Conclusion 14

Appendix A 14

CITATIONS

Brinegar v. United States, 69 S. Ct. 1302, 338 U.S. 160, Syllabi 8, 9, 10 8

Dixon v. Maxwell, 1770 O.S. 20 at 21 5

Draper v. United States, 358 U.S. 307, 79 S. Ct. 329 .. 8

Johnson v. Reedy, 163 O.S. 347, Syllabus 2 5

In re Kosopud, et al., 272 F. 330, Syllabus 7 12

Porello v. State, 121 O.S. 280, Syllabus 1 7

State v. Ball, 30 O.O.(2d) 304, 1 O.A. 297 6

State of Ohio v. Crockett, 10 O.Misc. 245 12

State v. Fultz, 13 O.S.(2d) 79, at 80, 81 13

State v. Terry 13

In The

Supreme Court of the United States

October Term, 1968

No. 1471

GEORGE H. FULTZ,

Petitioner,

v.

STATE OF OHIO,

Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

OPINIONS BELOW

The Brief of the petitioner correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The petitioner's Petition for a Writ of Certiorari is from a judgment of the Supreme Court of the State of Ohio entered on February 28, 1968. It is the belief of the respondent that the petitioner's conviction under the laws of the State of Ohio was consistent with the Fourth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

1. Does probable cause to believe that a felony has been or is being committed exist where the information upon which the arresting officer acts is based upon information that he receives on his police radio?

2. When a police officer has information received by way of his police radio broadcast that an arrest warrant has been issued, may such officer lawfully arrest, detain and search a person named in the arrest warrant without having actual physical possession of such warrant?

STATEMENT OF THE CASE

We respectfully submit a Statement of the Case as we believe it to have been shown by testimony as presented at the time of trial. With due respect to counsel for petitioner, we feel that certain important aspects in the Statement of the Case, upon which the lower courts ruled in this matter have, perhaps by inadvertance, been left out.

On April 30, 1966, Chief John Fritz of the Loveland Police Department, at approximately 12:15 P.M., answered a trouble call at a trailer park in Loveland, Ohio. At 12:45 P.M. Chief Fritz transported the prosecuting witness, one Dolly Meece, to the Area Court Clerk's office for the purpose of signing a warrant for Assault & Battery against one George H. Fultz. Some time between 1:50 and 2:45 P.M. on the thirtieth a warrant was signed and issued for the arrest of the petitioner for the crime of Assault & Battery.

At approximately 2:45 P.M. a police radio broadcast was put out that a warrant had been issued for the arrest of the petitioner. Some time prior to 3:00 P.M. a police broadcast was issued that the petitioner, George Fultz, was

armed and had assaulted some people in Loveland, with a gun.

At approximately 3:00 P.M. petitioner, George Fultz, was apprehended by Officer Miller of the State Highway Patrol, and at approximately 3:05 P.M. Patrolman V. Wright of the State Highway Patrol arrived, and in searching petitioner's automobile found the .32 caliber loaded revolver under the front seat of said automobile.

Subsequently, at approximately 5:00 P.M. petitioner was charged by Officer Wright with the crime of carrying concealed weapons.

Petitioner was subsequently indicted, and counsel was appointed to represent him. A Motion to Suppress the Evidence was filed, a hearing was had thereon, and the Motion was overruled. At the time of trial a Motion to Suppress the Evidence was orally made, and a ruling on this Motion was deferred until testimony was given and the evidence offered. Subsequently the Court of Common Pleas of Hamilton County, Ohio, ruled that there was a lawful arrest and a lawful search, and the evidence was admitted. The petitioner was thereupon found guilty of the crime of Carrying Concealed Weapons.

A probation report was requested and obtained by the Court on the petitioner, but sentence of the petitioner was continued, at his request, pending a determination of his appellate proceedings.

The petitioner filed an appeal within time in the Court of Appeals for the First Appellate District of Ohio, and the judgment of the Court of Common Pleas was affirmed without opinion.

He subsequently filed his Notice of Appeal to the Supreme Court of Ohio, for which Leave to Appeal was

granted; a hearing was held and the judgment affirmed, with opinion (Appendix A, page 14). He thereafter filed his Petition for Writ of Certiorari with this Court.

ARGUMENT AGAINST GRANTING THE WRIT

As to petitioner's Questions of Law Nos. 1 and 2, we respectfully submit that his statements in said questions of law are taken out of context of the case and the testimony before this Court.

QUESTION NO. 1

As an example, petitioner says in his Question of Law No. 1 that "the only information or knowledge held by the arresting officer consists of a 'man-wanted' police-radio broadcast". It is submitted, by virtue of the testimony at the trial, that the facts indicate that the police officer knew a lot more than just that a man was wanted.

On page 34 of the Transcript the officer says:

> "I didn't know what he was wanted for, but I knew that a warrant was obtained".

On page 42 the following appears:

> Q. "What felony did you believe was being committed"?
> A. "I believed the man to be armed".
> Q. "And were you able to see the gun at that time that you believed to be armed"?
> A. "No, I did not".

And on page 45 is the following:

> Q. "You know it isn't a felony in this state to be armed, don't you, Mr. Miller"?
> A. "I knew that the man was armed with a gun. That was the knowledge or the information I had".

The following appears on page 46:

> Q. "Right. So all you knew was there was some complaint out about a man with a gun being wanted by Loveland police, isn't that accurate"?
>
> A. *"I also knew he had assaulted some people* there in Loveland with the gun and that was the message".

There are other places in the Transcript which indicate additional points of information that were known by the arresting officer at the time of the arrest in question. It is clearly seen that counsel's statement that the only information that the officer had was that there was a man-wanted police radio broadcast is clearly not sustained by the evidence as brought forth at the time of the trial.

We would like to point out that the courts have long considered that information based upon a request of other police agencies is more than just ordinary hear-say evidence. In the case of *Johnson* v. *Reedy*, 163 O.S. 347, Syllabus 2, it is said:

> "Where a police officer makes an arrest without a warrant at the request of another police agency, all reasonable doubts concerning the reasonableness of the information on which the arresting officer acts should be resolved in his favor".

We would also like to point out that in the case cited by defense counsel, namely, *Dixon* v. *Maxwell*, 177 O.S. 20, at page 21, the Court says:

> "It is the petitioner's contention that, inasmuch as the officers admitted that they did not know that a specific crime was committed and did not even know at the outset which apartment petitioner had gone into, there was no probable cause for the arrest".
>
> "Petitioner unduly restricts the right to arrest. *It is not necessary that an officer know that a specific crime*

has been committed in order for him to have probable cause to make an arrest. It is sufficient if he has reasonable grounds to believe from the circumstances that a felony has been committed, and that the accused has committed it".

It is true that the officer stated at the time of the trial that he could not specifically pinpoint the particular felony which the defendant committed, but that he had reasonable grounds to believe that a felony was committed. As he testified, and as has hereinbefore been set forth, he knew:

1. The man was armed.
2. He had assaulted some people in the City of Loveland.
3. When he first approached the man he did not see the gun in question.

Clearly the evidence adduced in this case would give the officer reasonable and proper cause to believe, from all the surrounding circumstances, that a felony had been committed, and that the accused in question had committed it.

In addition, we submit to the Court that in the case of *State* v. *Ball,* 30 O.O. (2d) 304, 1 O.A. 297, the third Syllabus says as follows:

> "Reasonable cause for the arrest of a person by police officers without a warrant exists where such officers acted on information furnished by the police department of another city, and the defendant fails to show by evidence that the arresting officers had no reasonable cause to believe that a felony had been committed."

In the case before the Court the police officer was acting on a police broadcast. Under the circumstances it cer-

tainly should be given the same weight, if not greater weight, than information furnished by a separate and distinct police agency, as indicated in the above mentioned case.

We also refer for the Court's consideration in this matter the case of *Porello* v. *State,* 121 O.S. 280, which case also involves the carrying concealed weapons charge. In *Syllabus 1* of that case, the Court says:

> "A police officer of a municipality is authorized without a warrant to arrest a person found on the public streets of the corporation carrying concealed weapons in violation of Section 12819, General Code, although such police officer has no previous personal knowledge of the fact, if he acts bona fide and upon information as induces an honest belief that the person arrested is in the act of violating the law".

It might be further pointed out that this case involved a search of an automobile, in which the Court, in the *4th Syllabus,* held that the automobile was in the immediate vicinity or proximity of the defendant in that case.

It is also stated in the *Porello* case at page 285:

> "This is not a case involving a search of a dwelling house. Here we have a search made of a person and of an automobile, under circumstances in which the police officers acted bona fide and upon information which induced in them an honest belief that the person arrested was in the act of violating the law. Paralysis of the police system would result if duly authorized officers were compelled minutely to verify their suspicions prior to acting upon honest belief in search and arrest under such circumstances."

It is to be pointed out that on page 32 of the Bill of Exceptions the police officer who made the initial arrest indicated that he believed that a felony had been committed.

Quoting from the case cited by defense counsel of *Brinegar* v. *United States*, 69 S. Ct. 132, 338 U.S. 160, *Syllabi 8, 9 and 10:*

"Syl. 8. Probable cause for search without warrant is reasonable ground for belief of guilt, which means less than evidence which would justify conviction".

"Syl. 9. Probable cause for search without a warrant means more than a bare suspicion and exists where the facts and circumstances within knowledge of the officers and of which they had reasonable and trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed".

"Syl. 10. Because many situations which confront officers in course of execution of their duties are more or less ambiguous, room must be allowed for some mistakes on their part in determining whether probable cause for search without warrant exists, but mistakes must be those of reasonable men acting on facts leading sensible to their conclusions of probability".

In the case of *Draper* v. *United States*, as reported in 358 U.S. 307, and 79 S. Ct. 329, the Court held in *Syllabi 6 and 7 that*:

"Syl. 6. In dealing with probable cause for making an arrest, courts deal with probabilities, and they are not technical but are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act".

> "Syl. 7. Probable cause for an arrest where the facts and circumstances within an arresting officer's knowledge and of which he had reasonable and trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed".

In light of the case law, it would definitely appear that the police officer in the within case had reasonable and probable cause to believe that a felony had been committed, by virtue of information that he had received from a police radio broadcast, which is one of the basic fundamentals of law enforcement work in our modern society.

QUESTION NO. 2

As to the second question of law we would like to point out that the statement "who does not have physical possession of either a search or an arrest warrant" begs one of the issues. It is the contention of the respondent that the officer in question, as will hereinafter be set forth, when arresting a person on a misdemeanor, does not have to have the physical possession of the warrant in question. We would concur in petitioner's statement that the constitutional validity of the search depends upon the constitutional validity of the arrest.

We would like to point out that the Transcript indicates that the police officer arrived at Loveland, Ohio, according to the testimony, at approximately 12:15 P.M. and 12:45 P.M., and they subsequently arrived at the Clerk of Courts in Lockland, Ohio, at approximately 1:50 P.M., and they left the Lockland Police Department, after obtaining a warrant for the arrest of the petitioner, at approximately 2:45 P.M. This information is set forth in the Transcript

on pages 12 and 13. It is to be further pointed out that the arrest in question occurred at approximately 3:00 P.M. (R. 36).

In the trial, the attesting officer stated:

> "Well, he was wanted by the Loveland Police Department".
>
> The Court: "For what"?
>
> "I didn't know what he was wanted for, but I knew that a warrant was obtained".

And on page 38:

> Q. "You informed him why you stopped him; that Chief Fritz was going to meet you, and there was a warrant for the arrest of Fultz; is that right"?
>
> A. "Yes".

We would concur with counsel in his generalized statements that the constitutional validity of a search depends upon the constitutional validity of arrest. We also concur with counsel to the effect that, in Ohio, a person may not be arrested for the commission of a misdemeanor offense unless the offense was committed in the presence of the arresting officer, *or*, unless a warrant was first obtained.

However, we believe that counsel's contention that the arresting officer must have physical possession of the misdemeanor warrant is unduly restrictive, and was never contemplated by the Legislature. The citizen is adequately protected by virtue of an order in which a warrant has been previously obtained in the matter. It would seem a mockery of justice if every time a police officer who knew that a person was wanted under a misdemeanor warrant, which was on file at the Clerk's office, or his district, would have to go up to the person and state to him:

"Please stay here until I can run down to the police station to obtain the physical possession of your arrest warrant, so that I may arrest you".

Or, let us suppose that two police officers go to effect an arrest, which is not unusual, upon a warrant which one of them has in his possession. The officer with the warrant goes to the front of the house, while the officer who is with him goes to the rear of the house. The officer with the physical possession of the warrant knocks on the door, whereupon the defendant goes out the back door. If we take counsel's argument in his case, the officer in the rear of the premises, who does not have physical possession of the warrant, would not have the right to arrest the defendant because he did not have physical possession of the warrant.

To sustain counsel's contention in this matter would be placing the final spike into law enforcement officials, who bear the cross of society upon their shoulders.

The statute does not say that the police officer must have the warrant on his person at the time of the arrest. The statute merely states, in the case of a misdemeanor, that the warrant must first be obtained prior to the arrest of a defendant. The possibilities of the requirement of the physical possession of the warrant for a misdemeanor arrest in large communities would hamper law enforcement to such an extent that, in all probability, it would be actually nil, unless the suspect were caught right on the spot by the police officer when a misdemeanor, as such, is involved. It is the belief of the undersigned that this was not the intention of the Legislature and the Court in their previous rulings on this subject.

We researched the question as to whether or not a police officer must have the physical possession of a warrant

charging a misdemeanor. In researching the proposition we were able to come across a federal case, *In re Kosopud, et al.*, 272 F. 330, in which it is stated in *Syllabus* 7:

> "Where warrant of arrest has been issued and instructions to act thereon have been received by the arresting officer, his arrest of the person named in the warrant is not unlawful because the arresting officer, at the time of the arrest, does not have the warrant in his physical possession".

This, in our opinion, specifically, without any question, spells out the law which we believe to be the general law of this case, as well as other cases.

We wish to point out that the police officer in question did not think, suspect, or hope, that a warrant had been issued, but he was informed from a reliable source that such a warrant had been issued, to-wit: a police radio broadcast. We again specifically refer to the officer's statement on page 34 of the Bill of Exceptions, in which he says:

> *"But I knew that a warrant was obtained".* (Emphasis ours)

See also the case of *State of Ohio* v. *Crockett,* 10 O. Misc. 245, which is a Municipal Court of Cincinnati case, in which it is held that a police officer may make a lawful arrest on a misdemeanor charge where a warrant has first been obtained and is on file, even though the police officer himself does not have physical possession of the warrant. This case might be distinguished perhaps by the fact that the warrant is directed to the Chief of Police and all officers in that department are his agents, whereas in the case at bar we have a separate police entity.

However, in modern urban life with the criss-crossing of urban communities, and with the interstate and intra-

state expressways in urban areas, there must be a co-operative operation in law enforcement between various police agencies. It is not unusual or uncommon for a person in an urban community to pass through five or six communities in a ten or fifteen minute time spread.

Can it be said that a person's constitutional rights are violated because of a co-operative spirit existing between police agencies to come to the aid of their fellow agencies in another community by making an arrest on information that a warrant has been issued? In the *State* v. *Terry* opinion recently released by this Court it was said:

> "We deal here with an entire rubric of police conduct — necessarily swift action predicated upon the spot observations of the officer on the beat * * *"

In the current case before this Court, the Supreme Court of the State of Ohio said in 13 O.S. (2d) 79, at pages 80 and 81:

> "Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by modern-day criminals. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information".

CONCLUSION

We can see no compelling reason why this Court should grant the Writ requested. We sincerely believe that the petitioner's arrest, either as a result of a warrant previously issued, or as a result of probable cause to believe that a felony had been committed, was sufficient to constitute a good and valid arrest. In that we have a good and valid arrest, the search and seizure which was incidental to said arrest is valid, and there is no basis for the granting of a Writ of Certiorari.

Respectfully submitted,

MELVIN G. RUEGER
Prosecuting Attorney
LEONARD KIRSCHNER
Ass't. Prosecuting Attorney
420 Court House
Cincinnati, Ohio 45202
Attorneys for Respondent

APPENDIX A

THE STATE OF OHIO, APPELLEE, v. FULTZ, APPELLANT.

(Cite as State v. Fultz, 13 Ohio St.2d 79)

Arrest without warrant — Probable cause — What constitutes — Information received by officer over police radio.

---

1. To have probable cause to arrest without a warrant an officer must have sufficient information from a reason-

ably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. (Section 2935.04, Revised Code, construed and applied.)

2. Where a police officer has received information over the police radio and that information is such as to give the officer reasonable grounds to believe a felony has been committed, such officer has probable cause to make an arrest.

(NO. 41004—Decided February 28, 1968)

Appeal from the Court of Appeals for Hamilton County.

On April 30, 1966, the chief of police of Loveland, Ohio, was summoned to a trailer park in that city. There he met one Dolly Meece who accompanied him to Lockland where she signed an affidavit charging George H. Fultz, appellant herein, with assault and battery, a misdemeanor. A warrant was issued for his arrest.

A call was put out on the police radio for the apprehension of Fultz. From the testimony at the trial it appears that the radio message contained the information that a warrant had been issued for the arrest of Fultz; that he was armed; and that he had assaulted some people with a gun.

Within a short time a state highway patrolman who had heard the radio message stopped Fultz in his car at the intersection of Loveland-Madeira Road and Branch Hill Pike. A second patrolman arrived shortly thereafter and conducted a search of Fultz' car. He found a gun under the front seat.

Subsequently, Fultz was indicted for and found guilty of the crime of carrying a concealed weapon. The judgment of conviction was affirmed by the Court of Appeals

and the cause is now before this Court following allowance of a motion for leave to appeal.

Mr. Melvin G. Rueger, prosecuting attorney, and *Mr. Leonard Kirschner,* for appellee.

Messrs. Morr & Gilday and *Mr. Bernard J. Gilday, Jr.,* for appellant.

MATTHIAS, J. The primary question raised by this appeal is whether an arresting officer may base his belief that a felony has been committed on information received by him from a broadcast over a police radio. It is the appellant's position that such a source of information is not reliable enough to furnish the officer with probable cause to make the arrest.

In disposing of this question it is well to consider the realities of crime and law enforcement in present-day society. To effectively combat crime today, the concerted effort of local, state and federal officers, with their vast network of radio and teletype communication systems, is required. The present-day criminal is a mobile criminal. Because of his use of the motor vehicle and other means of rapid transportation even a slight delay in his apprehension will give him an opportunity to be far removed from the scene of the crime and the person or persons he has injured or exploited. The criminal-at-large is a threat to society; thus, it is the duty of the police to apprehend him at the earliest opportunity not only because of the crime committed but to prevent further depredations by him.

Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To

do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by the modern-day criminal. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information.

A police officer necessarily relies on the information he receives over the police radio, and upon the receipt of such information it is the duty of the officer to act and act quickly. And, where the information is such as to give the officer reasonable grounds to believe a felony has been committed, then he has probable cause to make an arrest.

In the instant case, the arresting officer was a state highway patrolman. Section 5503.02, Revised Code, provides in part:

> "* * * The superintendent of the state highway patrol or any patrolman may arrest without a warrant any person, who is the driver of or a passenger in any vehicle operated or standing on a state highway, who he has reasonable cause to believe is guilty of a felony, under the same circumstances and with the same power that any peace officer may make such arrest. * * *"

Furthermore, Section 2935.04, Revised Code, reads as follows:

> "When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, *any person without a warrant* may arrest another whom he has *reasonable cause to believe* is

guilty of the offense, and detain him until a warrant can be obtained." (Emphasis added).

It is worth noting that, under the terms of this statute, even a private citizen may make an arrest upon reasonably reliable information that a felony has been committed.

For an arrest without a warrant to be constitutionally valid the arresting officer must have probable cause to make it at that time. To have probable cause the officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. *Brinegar* v. *United States,* 338 U.S. 160; *Henry* v. *United States,* 361 U.S. 98, 102; and *Beck* v. *Ohio,* 379 U.S. 89.

The officer in the instant case testified that at the time of the arrest he believed that a felony had been committed by the appellant. The question is: Did he have reasonable ground for such belief? This is a question of fact and is dependent upon the information the officer received from the police radio message.

Unfortunately, the record does not contain a complete statement of what went out over the police radio. However, from the testimony in the record, it is clear that the officer learned from the police radio that appellant had assaulted persons in a trailer court with a gun (a felony under Section 2901.241, Revised Code); that he was armed; and that a warrant had been issued for his arrest. Certainly, with such information in his possession the officer had probable cause to make the arrest. The arrest, therefore, was valid.

Appellant has also questioned the validity of the search of his car which produced the weapon upon which the present conviction for carrying a concealed weapon is based.

The officer had been informed that appellant was armed, and the search, made by a second officer arriving a few minutes later, was conducted as an incident of the arrest. It is now well settled that a search of a motor vehicle incident to a valid arrest is a valid search. *Brinegar* v. *United States, supra* (388 U.S. 160). See *Dixon* v. *Maxwell,* 177 Ohio St. 20; *Draper* v. *United States,* 358 U.S. 307; *Harris* v. *United States,* 331 U.S. 145; and *United States* v. *Rabinowitz,* 339 U.S. 56.

Having determined that the arrest in the present case was valid, we conclude that the search was also valid.

There being no error prejudicial to appellant, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, O'NEILL, HERBERT and BROWN, JJ., concur.